74-737

SUPREME COURT OF THE UNITED STATES

October Term 1974

No. A-465

LEROY HOOD - - - - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

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v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in this case on May 31, 1974.

OPINION BELOW

The Kentucky Court of Appeals rendered a memorandum opinion, printed in Appendix A hereto, *infra*, pp. 15-16. This opinion is reported as a Memorandum Decision and ordered not to be published in 512 S. W. 2d 528. The trial court did not render an opinion.

JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on May 31, 1974. A timely petition for rehearing was denied and mandate issued on September 13, 1974, printed in Appendix B hereto, *infra*, p. 17. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

This case involves a Fourth Amendment question and, while seemingly involved, the questions and circumstances are summarized as follows:

I.

Whether under the following circumstances the Fourth Amendment should extend to exclude from evidence the identification of a stolen vehicle:

(a) Where the defendant in possession, arrested by a state police officer on misdemeanor charges unrelated to the vehicle, was placed in custody in the county jail at Bardstown, Kentucky, and the vehicle impounded and towed away for storage in a privately owned garage some miles distant from the county seat;

(b) At the time of arrest no probable cause that the defendant was operating a stolen vehicle existed;

(c) A subsequent inspection of the vehicle made at the garage by the officer consisted of taking off the door post serial number and license plate number, which numbers were checked and established an apparently valid registration of the vehicle;

(d) Two or three days later the officer made a second inspection of the vehicle and at that time lifted the hidden secret I.D. number off the frame, having beforehand determined where to locate this secret number.

(e) Thereafter the lifted number was fed into the national crime reporting circuit (N.C.I.C.) and the circuit reported back a number almost identical (a difference of one digit) to a number belonging to a vehicle that had been reported stolen in Franklin County, Kentucky, some ten months beforehand.

(f) The owner of the reported stolen vehicle was then summoned to Bardstown and taken to the garage by the officer, made an exhaustive examination of both the exterior and interior of the vehicle, and identified it as his stolen pickup truck.

II.

Whether, under the above stated circumstances, the seizure (impoundment) of the vehicle without warrant or probable cause violated the protection afforded defendant by the Fourth Amendment?

III.

Whether, under the above-related or similar circumstances, the lifting of the secret identification from under the frame of a vehicle constitutes a "search" within the meaning of the Fourth Amendment?

IV.

Whether the defendant, in possession of the vehicle and subsequently charged with its theft, has standing to invoke Fourth Amendment rights?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

I.

The Fourth Amendment of The United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

II.

The Fourteenth Amendment of The United States Constitution provides in relevant part as follows:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Kentucky Revised Statutes

The pertinent Kentucky Revised Statute provides as follows:

> "433.220 [1194; 2739g-58] Grand larceny; taking of vehicle without consent of owner.
>
> "Any person guilty of larceny of money or other property of the value of one hundred dollars or more shall be confined in the penitentiary for not less than one nor more than five years. Any person who unlawfully takes, drives or operates a vehicle without the knowledge and consent of the owner shall be subject to the same punishment. (1962 c 245, § 1. Eff. 6-14-62)"

STATEMENT

In June 1973 petitioner Leray Hood was tried and convicted in a Kentucky state court (the Nelson Circuit Court) for taking and operating a motor vehicle without the owner's consent, a felony under Kentucky Revised Statute 433.220. The jury's verdict sentenced Hood to four years in the state penitentiary. On appeal, the Kentucky Court of Appeals affirmed the judgment of conviction.

On Saturday evening, December 23, 1972, Trooper Collins of the Kentucky State Police, while patrolling in a remote area of Nelson County, sighted a pickup truck parked off the road. This truck appeared to the trooper to be abandoned so he pulled up behind the truck, parked and got out of his patrol car to investigate. As Collins approached the truck, petitioner

Hood raised up from the seat of the truck. Collins observed that Hood was pulling up his trousers and that there was a female companion with him. Hood came out of the truck and started arguing with Collins. The trooper then placed Hood under arrest for disorderly conduct. Hood refused to be handcuffed and get into the patrol car, so Collins called Bardstown for assistance. Officer Goatley of the Nelson County Police arrived approximately ten minutes later and the two officers handcuffed Hood and put him into the police cruiser.

Hood was then taken to the Nelson County courthouse, where he was fingerprinted, his picture taken and charged with disorderly conduct and resisting arrest. Hood was lodged in the county jail, where he remained until December 26th or 27th.[1]

When Trooper Collins first came into contact with Hood, Hood was not under suspicion of operating a stolen truck. But later, Officer Goatley told Collins of the "possibility" that Hood was driving a stolen vehicle. Collins began his investigation after Goatley told him this. He had the truck towed to Bardstown Auto Wreckers, a private garage, after Hood had been taken away. Hood did not consent to a search or seiz-

[1]The record is not entirely clear as to the exact date of Hood's release. He was arrested and locked in jail on Saturday night. The next day was Sunday and the following day, December 25th, was a holiday. Hood was brought before the County Judge, it is believed on Tuesday, December 26th, and fined on the misdemeanor charges of disorderly conduct and resisting arrest. According to the record, the affidavit and warrant for Hood's arrest on the stolen vehicle charge was taken before the County Judge on December 26, and same was executed upon Hood on the next day, December 27th.

ure of the vehicle at the time of his arrest or at any later date. At no time did either of the officers attempt to obtain a search warrant based on information that the vehicle was stolen.[2]

After the truck had been taken to the garage, where it was stored inside, Collins continued his investigation at this place. He first took the serial number off the door post of the truck and, together with the license plate number, checked and found that these numbers corresponded with a valid registration in the name of Donald Hood, brother of the petitioner. Collins described this serial number as "the wrong one." Since he was unable to identify the truck as a stolen vehicle from this, he went back to the garage on December 26, three days after petitioner's arrest. At this time he had obtained information where to find the hidden number and on this occasion he lifted the secret serial number from the frame of the truck. As Col[illegible] testified, ". . . we lifted, got the information where the secret serial number was on the frame of the truck. I located the number, made a lift of it and have it here . . ."

This number was run through the NCIC circuit. There was a one digit difference in the lifted number and a number reported back by the circuit. This latter number belonged to a vehicle reported stolen from a Sam Tracy in Franklin County, Kentucky, on Febru-

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[2]Goatley's information must be relegated to the realm of mere suspicion, based on his own testimony that he felt "my information was not substantial enough to obtain a search warrant or attempt to investigate the incident. Further, at that time I wasn't sure". (See Appendix E hereto, *infra*, pp. 21-28.)

ary 6, 1972.[3] Therefore, Sam Tracy was called to Bardstown to attempt identification by a physical examination of the truck. On December 26, Tracy and Trooper Collins went out to the garage and Tracy proceeded to make an exhaustive examination of the truck. His search included looking inside the truck, under the hood and under the dash. As a result, Tracy identified the truck as the one stolen from him more than ten months before Hood's arrest.

At the commencement of the trial, by way of a written pre-trial motion to suppress, the petitioner first sought to assert his federal constitutional right he now seeks redress before this Court. The petitioner contended in this motion that the warrantless search and seizure of the truck in question was without probable cause and in violation of the Fourth and Fourteenth Amendments of the United States Constitution. The motion, found on page 12 of the Transcript of Record, is printed as Appendix C hereto, *infra*, pp. 18-19, and was overruled by the trial judge following a pre-trial hearing (Transcript of Evidence, pp. 14, 16).

The petitioner again raised the question of his constitutional rights in the trial court by way of a motion for a new trial, wherein he asserted that the evidence clearly established that the search and seizure was conducted without a search warrant, was not incident to his arrest, and at a point and time remote from his arrest. This motion, found at page 16 of the Transcript of Record, is printed as Appendix D hereto,

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[3]The erroneous identification number was later traced to a mistake made by the county clerk in recording the number from the bill of sale to the registration certificate.

infra, p. 19. The motion was overruled by the trial court.

On appeal, the petitioner specifically raised the federal question by way of assignment of error in his brief. The assignment specified the trial court's denial of petitioner's motion to suppress evidence and his motion for a new trial on ground that the search and seizure of the vehicle was unlawful, in violation of the Fourth and Fourteenth Amendments. The portion of the brief relied upon to support petitioner's timely assignment of error, being voluminous, is printed as Appendix E hereto, *infra*, pp. 21-29.

Finally, following the Kentucky Court of Appeals' decision affirming the judgment of conviction, the petitioner requested rehearing to bring to the court's attention the apparent inconsistency regarding the petitioner's Fourth Amendment rights as determined by the United States Supreme Court and the Kentucky Court's decision. The Petition for Rehearing, printed as Appendix F, hereto, *infra*, pp. 28-32, was denied. (See Appendix B, hereto.)

REASONS FOR GRANTING THE WRIT

I.

The decision of the Kentucky Court is in conflict with the decisions of this Court holding that a warrantless search and seizure is unreasonable *per se*, subject only to a few specifically established and well-delineated exceptions, including the so-called "automobile" exception.

The basic holdings of this Court with which the Kentucky Court's decision collide are stated and reaffirmed in the following, among others:

Carroll v. United States, 267 U. S. 132, 69 L. Ed. 543, 45 S. Ct. 280, 39 ALR 790 (1925);

Chambers v. Maroney, 399 U. S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975 (1970);

Coolidge v. New Hampshire, 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971).

This Court has insisted, as stated in *Chambers* (p. 51), upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution, and then only in exigent circumstances will the judgment of a police officer as to probable cause serve as a sufficient authorization for a search.

In the instant case the officer claiming possession of information that the petitioner was possibly driving a stolen vehicle, contradicted the requisite for probable cause by his own testimony to the effect that his information was not substantial enough to obtain a search warrant, or for that matter, to even investigate further.

Even had probable cause existed at the time of arrest, no exigent circumstances existed to justify a warrantless search. As stated in *Coolidge*, "... by no stretch of the legal imagination can this be made into a case where it 'is not practicable to secure a warrant'" (p. 462).

As related in our statement above, the seizure and subsequent search of the vehicle were remote both in distance and time and clearly not incident to the peti-

tioner's arrest. The petitioner was in custody and the vehicle had been immobilized by impoundment in a garage some miles distant. Further, the first inspection of the vehicle failed to uncover any evidence incriminating the petitioner, and the subsequent inspection wherein the hidden identification number was lifted was made several days later and while the petitioner was still in jail.

Nor was there any relationship between the offenses for which the petitioner was arrested and the vehicle or its contents as being an object or evidence of the commission of a crime. There is no contention that the petitioner gave his consent to the search and seizure.

The seizure and subsequent search of the vehicle without probable cause and no exigency existing, therefore, violated the petitioner's Fourth and Fourteenth Amendments rights under the holdings of this Court.

II.

Even if one proceed on the theory that the police were justified in taking the vehicle into so-called protective custody for safekeeping, once it was delivered to a private garage keeper and a routine "plain view" inspection and inventory had been made, any subsequent inspection constituted an intrusion.

The implications are of vital concern to millions of vehicle owners, as well as the petitioner, should it be allowed that the police can indiscriminately seize, detain, search and lift concealed identification numbers, not in plain view and without probable cause, of any

vehicle that comes to their attention in their numerous contacts with citizens operating motor vehicles upon the public highways.

III.

The Kentucky Court held that the petitioner had no standing—only that of a thief—to invoke Fourth Amendment rights.

This issue, of important and substantive nature, apparently has not been squarely decided by this Court. The issue is whether a person in apparent valid possession of a vehicle when arrested on an unrelated charge, who is later charged with theft of the vehicle following the seizure and search of the vehicle disclosing evidence indicating a stolen vehicle, has standing to invoke the Fourth Amendment proscriptions of unreasonable search and seizure.

This Court has held, in analogous cases, where the element of possession of the seized evidence constitutes the crime charged, that the accused charged has standing even though he deny ownership of the item seized.

> Jones v. United States, 362 U. S. 257, 80 S. Ct. 725 (1960).

In the instant case, the taking, driving and operating of a vehicle without the owner's consent constitutes the crime charged under the Kentucky statutes. All evidence adduced in the trial had below flowed from petitioner's possession of the vehicle. There was no evidence of his taking, that is, stealing the vehicle from the owner. Petitioner's conviction turned upon his possession and was the essential element in prose-

cution's case. As stated in *Jones* (page 263), the petitioner is here subjected to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation.

IV.

Another issue, apparently not heretofore squarely decided by this Court of a substantial nature, is whether under any circumstances the lifting of a hidden identification number from a vehicle is or is not a search within the meaning of the Fourth Amendment.

The Kentucky Court held that there was no search. That the only intrusion was to read the serial numbers by which to determine ownership.

The question would seem to turn upon the circumstances of whether there is an intrusion of privacy. The specific question concerning whether lifting a hidden serial number constitutes a search has, apparently, yet to be finally resolved.

In Cardwell v. Lewis, ——— U. S. ———, 41 L. Ed. 2d 325, 94 S. Ct. ——— (1974) this Court, in the plurality opinion, held that under the circumstances of the case, *where probable cause exists*, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments. A definitive rule was not stated whether the lifting of the hidden identification number would constitute a mere examination of the car's exterior or would involve an intrusion of the right of privacy such as is afforded protection under the Fourth Amendment.

The dissenting opinion in *Cardwell* held that even upon probable cause, exigent circumstances must exist to warrant the *seizure* of the vehicle itself; that the Fourth Amendment protects against unreasonable seizures, as well as searches.

CONCLUSION

In conclusion, the petitioner respectfully requests this Court to invoke its authority to review his case as it is contended that under the circumstances of this case (a) there was no probable cause, (b) no exigent circumstances existed, (c) that lifting a hidden identification number constitutes a search, and (d) that the warrantless seizure and subsequent search of petitioner's vehicle was unreasonable, in violation of his rights secured by the Fourth and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

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